

Telehealth: CMS Proposes to Discontinue Audio-Only E/M Services and Virtual Direct Supervision in 2023 Proposed Rule

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On July 07, 2022 the Centers for Medicare and Medicaid Services (“CMS”) released the 2023 Physician Fee Schedule (“PFS”) Proposed Rule, which proposes several significant changes to Medicare telehealth services.

Temporary Telehealth Coverage Extended 151 Days after the PHE

CMS proposes to extend the availability of Medicare’s temporary telehealth services for 151 days after the end of the Public Health Emergency (“PHE”). CMS added temporary services to the Medicare Telehealth Services List as a result of the PHE, in an effort to limit exposure to COVID-19 and increase access to care. The temporary telehealth services will be removed from the Medicare Telehealth Services List when the PHE ends. However, if CMS’ proposal is finalized, the temporary telehealth services will remain on the Medicare Telehealth Services List for 151 days, or approximately 5 months, after the end of the PHE. CMS proposes this change to align Medicare telehealth flexibilities with the flexibilities that were extended for 151 days after the PHE under the Consolidated Appropriations Act, 2022.

Audio-Only E/M Services Discontinued

CMS proposes to discontinue reimbursement for audio-only evaluation and management (“E/M”) services, other than mental health care, following the end of the PHE and the 151-day extension period. Prior to the PHE, Medicare telehealth services required the use two-way, audio-video telecommunication technology. In early 2020, CMS instituted waivers that allowed for reimbursement of telehealth services furnished using audio-only technology (e.g., telephone), which over the past three years has become particularly prevalent, especially for beneficiaries that lack access to broadband service or video technology.

In proposing the discontinuation of audio-only services, CMS highlights that for telehealth services, other than mental health services, two-way, audio-video communications technology is the

appropriate standard. CMS further notes that telehealth services are required to be analogous to in-person care to serve as a substitute for a face-to-face encounter. If finalized, the telephone E/M CPT codes 99441, 99442, and 99443, will be removed from the Medicare Telehealth Services List and assigned a bundled status.

Virtual Direct Supervision Discontinued

Medicare Part B requires certain types of services (e.g., incident to services, radiation therapy services, diagnostic tests, etc.) to be furnished under the direct supervision of a physician or practitioner. Medicare direct supervision requires the immediate, *in-person and physical*, availability of the supervising physician or practitioner, but does not require the physician or practitioner to be present in the room during the service.

As a result of the PHE, CMS temporarily changed the definition of “direct supervision,” for certain services, to allow the immediate availability of the supervising physician or practitioner through virtual means via real-time audio and video technology. In the proposed rule, CMS declined to extend or permanently adopt virtual direct supervision and reminds providers that after December 31st of the year in which the PHE ends, the requirement to be immediately available for direct supervision may no longer be met through virtual presence. Importantly, upon the expiration of virtual direct supervision, telehealth services may no longer be performed by clinical staff incident to a physician’s professional service.

New Temporary Telehealth Services Added

CMS declined to *permanently* add new codes to the Medicare Telehealth Services List, citing a lack of evidence regarding the safety and appropriateness of furnishing such services via telehealth. However, CMS proposes to add 54 codes to the Medicare Telehealth Services List on a temporary, Category 3 basis. CMS introduced Category 3 to the Medicare Telehealth Services list in 2021. Category 3 services permit practitioners to provide the included services via telehealth on a temporary basis, while allowing CMS the ability to gather data to determine whether the services should be included on the telehealth list on a permanent basis. While not exhaustive, some of the services proposed to be added on a Category 3 basis include:

- Therapy Services: 97150, 97530, 97542, 97537, 97763, 90901, and 98960-98962.
- Behavioral Health Services: 97151 – 97158, 0362T, and 0363T.
- Speech Therapy Services: 92507, 96105, 96110, 96112, and 96113.

CMS notes that the temporary Category 3 services will expire at the end of CY 2023.

Federally Qualified Health Centers (FQHCs) & Rural Health Clinics (RHCs)

CMS proposes to temporarily make the following changes for FQHCs and RHCs for the 151-day period following the PHE:

- Continue payment for telehealth services furnished by FQHCs and RHCs using the methodology established for telehealth services during the PHE, which is based on payment

rates that are similar to the national average payment rates for comparable telehealth services under the physician fee schedule;

- Delay in-person visit requirements for mental health visits furnished by FQHCs and RHCs;
- Expand the originating site requirements to include any site in the United States where the beneficiary is located, including an individual's home; and
- Extend coverage and payment of telehealth services that are furnished via audio-only communications.

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